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SUPREME COURT, U.S.

NO. 80-2195

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

vs.

LEARLEY REED GOODWIN, RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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On January 9, 1981, the United States Court of Appeals for the Fourth Circuit reversed the Respondent's conviction for felonious assault on a federal officer, finding that he was denied due process of law when he was indicted and tried for that offense only after he had exercised his right to a jury trial on the petty offense and misdemeanor charges originally lodged against him for the same conduct. Petitioner now asks this Court to review this decision, citing the exceptional importance of the issue presented by this case. Respondent respectfully suggests that the holding of the court of appeals represents a correct, and unremarkable, application of settled principles of due process to the peculiar facts of this case, and neither departs from established precedent nor interferes with the appropriate exercise of prosecutorial discretion.

STATEMENT

1. On February 2, 1976, the Respondent was cited in violation notices filed in the United States District Court for the District of Maryland, at Hyattsville, Maryland, with the following offenses: (1) unlawfully failing to give aid,

information and identification at the scene of a personal injury accident, in violation of 18 U.S.C. §§7 and 13, and Annotated Code of Maryland, Transportation Article, §§20-102, 20-104; (2) assault by striking, beating or wounding, in violation of 18 U.S.C., §113(d); (3) fleeing or eluding a police officer, in violation of 18 U.S.C., §§7 and 13, and Ann. Code of Md., Trans. Art., §21-904; (4) reckless driving, in violation of Title 36, Code of Federal Regulations, Section 50.32; (5) exceeding the posted speed limits, in violation of 36 C.F.R. §50.31 (two counts). These violations were based on the Respondent's alleged misconduct on the evening of February 2, 1976. (See Petition for Writ of Certiorari, hereinafter referred to as "Pet.", 2-3).

On February 3, 1976, a complaint was filed alleging the aforementioned violations. On March 30, the Respondent appeared before United States Magistrate George E. Burgess for a preliminary hearing solely on the charge of fleeing or eluding, he not being entitled to such a hearing on the remaining charges which are merely petty offenses. The court found probable cause, and a trial on all the aforementioned charges was scheduled for April 29, 1976, before the Magistrate. Due to the Respondent's absence from the jurisdiction, the proceedings in this matter were held in abeyance until May 24, 1979. On that date, the Respondent was transported to the United States District Court at Hyattsville for trial before the Magistrate on the aforementioned complaint, as well as on the further charge of failure to appear, in violation of 18 U.S.C., §3150.

When the Respondent appeared before Magistrate Burgess for trial on May 24, the prosecution was represented by Ms. Blanche Bruce, a trial attorney with the Anti-trust Division of the Department of Justice in Washington. Ms. Bruce was on "a special detail for two weeks to the United States District Court of Maryland and she [was] charged with prosecuting petty offenses and misdemeanors for the Magistrate on the basis of complaints filed by law enforcement officers." (Joint Appendix in the Court of Appeals, hereinafter referred

to as "C.A. App.", 110). At the time of this proceeding, Ms. Bruce read the incident report filed by United States Park Police Officer Morrissette and discussed the offenses with the officer. Pursuant to her review of the report and conversations with the officer, Ms. Bruce was aware of the underlying facts of the incident of February 2, 1976. (C.A. App. 110-111).

Prior to the Respondent's appearance before the Magistrate, defense counsel approached Ms. Bruce to determine if the prosecution would consider a plea. Although Ms. Bruce expressed some interest in the proposal, plea negotiations did not develop any further since the Respondent indicated an unwillingness to plea bargain. During this abortive attempt to dispose of the case without a trial, there were no discussions concerning possible additional and more serious charges being brought against the Respondent. (C.A. App. 111).

Upon his appearance in court, the Respondent refused to consent to be tried by the United States Magistrate and requested a jury trial. The matter was then transferred to the United States District Court for the District of Maryland, at Baltimore.

Subsequent to the transfer of the case to Baltimore, the United States Attorney for the District of Maryland sought and obtained from the Grand Jury, on July 3, 1979, an Indictment charging the Respondent with fleeing or eluding a police officer and failure to appear, as previously charged, as well as the additional charges of assault upon a federal officer, in violation of 18 U.S.C., §111, and assault with a dangerous weapon within the special territorial jurisdiction of the United States, in violation of 18 U.S.C., §113(c).[1/]

[1/] Relative to the return of the superseding Indictment, see Pet. 4-7.

2. On September 12, 1979, a jury found Respondent guilty of the felonious assault upon a federal officer, and of the misdemeanor charge of fleeing or eluding a police officer. He was acquitted on the charge of assault with a dangerous weapon. The failure to appear charge, which had been severed for purposes of trial, was later dismissed.

3. Subsequent to the jury verdict, the Respondent moved for the dismissal of the felonious assault charge on the grounds that the filing of this charge, after he had refused to consent to be tried by the United States Magistrate, violated his Fifth Amendment right to due process of law. Although the trial court granted relief from the waiver provisions of Rule 12(b) of the Federal Rules of Criminal Procedure, the Respondent's motion was denied.[2/]

4. A divided panel of the court of appeals reversed Respondent's felony conviction. (Pet. App.A, 1a-15a). The court clearly disclaimed any reliance upon the notion that actual vindictiveness motivated the seeking of the felony charges. However, while finding no actual vindictiveness, the majority concluded that the circumstances surrounding the return of the felony indictment subsequent to the Respondent's exercise of his right to a jury trial gave rise to a genuine risk of retaliation. It stated:

> Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retailiation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

(Pet. App. A, 6a). Judge Widener dissented, arguing that the procedures followed in this case, which resulted in the

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[2/] See Petition for Writ of Certiorari, Appendix D, hereinafter referred to as "Pet. App. D.", 19a-20a.

increased charges, were sanctioned by this Court's decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978). (Pet. App. A, 14a-15a).

5. A Petition for Rehearing En Banc filed by the Government was denied on April 16, 1981.[3/]

ARGUMENT IN OPPOSITION

1. Petitioner claims that the ruling of the court of appeals is based on a serious misreading of this Court's decisions in Blackledge v. Perry, 417 U.S. 21 (1974), and Bordenkircher v. Hayes, supra, and further, that it conflicts with the decisions of several other courts of appeals. These claims are unfounded.

In North Carolina v. Pearce, 395 U.S. 711 (1969), this Court held that after the successful appeal of a conviction, an accused may not be subjected to a harsher sentence upon retrial and reconviction absent identifiable conduct occurring after the original sentencing proceeding. Noting that imposition of a heavier sentence upon a reconvicted defendant for the express purpose of penalizing him for having successfully challenged his conviction would be a flagrant violation of due process of law, this Court stated "due process... requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 725.

[3/] As noted by Petitioner, the Petition for Writ of Certiorari in this case was filed eleven days out of time under Rule 20.1 of the Rules of this Court. Respondent readily acknowledges that no prejudice has been, nor will be, suffered as a result of this untimeliness. Nevertheless, nothing in the Rules suggests that an opposition to a petition for writ of certiorari filed jurisdictionally out of time must be supported by a showing of such prejudice. Therefore, pursuant to Rules 20.3 and 22.3 of the Rules of the Supreme Court of the United States, Respondent respectfully objects to the jurisdiction of this Court to grant the writ of certiorari.

In Blackledge v. Perry, supra, the Pearce rationale was extended to protect the accused from the fear of prosecutorial vindictiveness. In Blackledge, the defendant exercised his statutory right to a trial de novo following a misdemeanor conviction in the lower court. The prosecutor then obtained a felony indictment based on the identical conduct upon which the misdemeanor charge had been brought. Although there was no indication of bad faith or malice on the part of the prosecutor, this Court held the subsequent felony charge constitutionally impermissible. Noting that the "opportunities for vindictiveness" in that context required a rule analogous to that established in Pearce, this Court stated:

> A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id. at 28.

The legal principle enunciated in Pearce and Blackledge, therefore, is that due process mandates freedom from even the apprehension of retaliation or vindictive punishment for the exercise of statutory rights. This rationale is obviously "not grounded upon the proposition that actual retaliatory motivation must inevitably exist", Blackledge v. Perry, supra, at 28, but rather upon the notion that the apprehen ion of such vindictiveness may unconstitionally deter a defendant's exercise of his statutory or constitional rights, and therefore violate due process.

In United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976), the Fourth Circuit carefully followed the reasoning of Blackledge. In Johnson, the defendant was originally charged in a four-count indictment and pled guilty to two of those counts. However, on appeal, the convictions were

vacated for lack of compliance with Rule 11, Federal Rules of Criminal Procedure, and remanded. The Government then obtained a superseding forty-one count indictment which included the four original charges. The defendant was subsequently tried and convicted on seven counts, one of which was an original charge.

In its application of the Blackledge rationale, the Fourth Circuit clearly set forth the factual predicate for its conclusion that the defendant's prosecution on the increased charges of the superseding indictment denied him due process of law. First, it found that the Government was ready to proceed to trial on the original indictment and that it was aware of all of the facts essential for the superseding indictment before the guilty plea had been entered by the defendant. Only after the defendant had successfully challenged his plea on appeal was the superseding indictment returned. Second, there was no new evidence discovered between the guilty plea and the new indictment which could justify the additional charges. Noting that Blackledge does not require proof of actual retaliation, the Fourth Circuit concluded that the case before it fell within the doctrine established in Pearce and Blackledge, which is designed to protect the accused from the apprehension of vindictiveness, as well as actual retaliation.

The majority's holding in this case is simply a reaffirmation of the Fourth Circuit's previous interpretation of this Court's decisions. Here, the Respondent was brought before the United States Magistrate for trial on misdemeanor and petty offense charges but refused to consent to be tried at that time and elected a jury trial. Subsequent to his election, he was charged in a superseding indictment which contained two felonies, as well as two of the original charges. All of the facts essentia. to the superseding

indictment were known by, or available to, the prosecution before the Respondent appeared for trial on the original charges and elected a trial by jury. Further, no new evidence was discovered by the prosecution nor was there any further misconduct by the Respondent to justify the additional charges. Stated simply, it is clear that the prosecution could have initially proceeded on the felony charges but instead elected to charge and try the respondent before the Magistrate. The majority's conclusion that the Respondent would have been tried before the Magistrate solely on the lesser charges "but for" his election of a jury trial is thus manifestly correct.

2. The Petitioner claims that the majority opinion reflects a misinterpretation of this Court's decision in Bordenkircher v. Hayes, supra. While the Government's reliance upon Bordenkircher in these proceedings has been persistent, it is misplaced. As stated by the court of appeals, and with ample support, "Bordenkircher is easily distinguishable from Blackledge and from the present case." (See generally Pet. App. A., 6a-8a).

Bordenkircher v. Hayes, as Judge Widener in dissent correctly noted, (Pet. App. A., 14a-15a), sanctioned prosecution on higher charges following an expressed threat of retaliation during plea negotiations. It is clear, however, that Bordenkircher holds only that actual retaliatory behavior is permissible in the context of the "give and take" of plea bargaining. Indeed, this Court expressly limited its holding to "the course of conduct engaged in by the prosecutor in this case," id. at 365, and stated that the Court was not dealing with a situation analogous to that presented in the instant matter, that is, "a situation where the prosecutor without notice brought an additional and more serious charge

after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360.

Bordenkircher neither undermines nor modifies Blackledge or its rationale as interpreted by the Fourth Circuit.[4] Quite simply, the circumstance presented in Bordenkircher is the exception, not the rule, "where a prosecutor acted vindictively, but an independent factor -/the defendant's ability to choose - eliminated any due process problems." United States v. Andrews, 633 F.2d 449, 457 (6th Cir. 1980). The majority opinion fairly responds to the Government's argument in this respect, and Petitioner's reliance upon an alleged misreading of Bordenkircher in characterizing this case as one of exceptional importance is fatuous.

3. Petitioner claims that the panel decision "will impair the government's ability to rebut claims of prosecutorial vindictiveness in an ever increasing number of cases." (Pet. 14). The fact that Petitioner now seeks this Court's review of the decision on this basis manifests a fundamental misapprehension of the majority opinion since nowhere in that opinion is the Government precluded from that opportunity which it desires. Indeed, such proof is expressly invited. (Pet. App. A, 10a).

In Pearce and Blackledge, this Court recognized that

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[4] In the instant matter, the Government has previously argued that Bordenkircher demonstrates that this Court's "fundamental concern was actual, rather than the defendant's perceived prosecutorial retaliation." See Appellee's Brief in court of appeals,11. The majority opinion correctly points out, however, that "the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not." (Pet. App. A, 8a). This conclusion by the Fourth Circuit is buttressed by a referral to Blackledge v. Perry which states in this regard that "the lesson that emerges from Pearce, Colten [v. Ky., 407 U.S. 104 (1972)] and Chaffin [v. Stynchcombe, 412 U.S. 17 (1973)] is that the Due Process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'." Blackledge v. Perry, 417 U.S. at 27.

apparently retaliatory conduct might be consistent with due process under certain circumstances. For example, under Pearce, a harsher sentence upon retrial and reconviction is permissible if based upon "objective information concerning identifiable conduct... occurring after the time of the original sentencing proceeding." North Carolina v. Pearce, 395 U.S. at 726. Similarly, Blackledge allows a more serious charge to be brought after a defendant invokes his right to a trial de novo if it had been "impossible to proceed on a more serious charge at the outset." Blackledge v. Perry, 417 U.S. at 29, n. 7. The majority opinion in the instant matter does not detract from this basic notion, explicitly recognizing that due process is satisfied when there is a showing that the new charges could not have been brought prior to the defendant's exercise of his statutory or constitutional rights. (Pet. App. A, 6a).

Clearly, there is nothing in the majority opinion that deprives the Government of precisely what it claims is required, that is, an opportunity to present objective evidence demonstrating that the increased charges rested on non-vindictive grounds. Indeed, the majority opinion explicitly ensures such an opportunity. It is the simple fact that the Government possessed such an opportunity but failed to rebut the appearance of vindictiveness presented by the circumstances of this case that mandated the reversal of the Respondent's conviction.

4. Criticizing the alleged failure of the majority opinion to permit rebuttal of the charge of prosecutorial vindictiveness in this case, Petitioner contends that the result reached here by the Fourth Circuit reflects an interpretation of the due process clause in direct conflict with the other circuits. (Pet. 20). Contrary to this assertion, the factual and procedural circumstances presented

by this case permit only one conclusion regardless of the applicable interpretive framework and do not expose significant inconsistencies among the circuits.

Petitioner's reliance upon the approach adopted by the Fifth Circuit is ill-advised. The standard established in Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), and which is representative of the "balancing test" followed by at least the Sixth Circuit, see e.g. United States v. Andrews, supra, weighs the accused's interest in the right to be free from apprehension of governmental retaliation for the exercise of his rights against the prosecution's interest and the exercise of its discretion. In the application of this balancing process, the "subtle but critical distinction between the addition of charges as contrasted with the substitution of charges", United States v. Andrews, 612 F.2d 235, 242 (6th Cir. 1979), rev.'d United States v. Andrews, 633 F.2d 449 (6th Cir. 1980), is controlling. Where more serious charges, based on new and distinct criminal activity, are added, an independent discretionary prosecutorial decision has been made for the first time, and it is enough that the prosecutor prove only the absence of a vindictive motive. In this instance, the prosecution's interest in the proper exercise of its discretion outweighs the countervailing interest of the accused.

However, where a more serious charge is substituted for a lesser one, and that charge is based on the same criminal conduct, the Government's interest in preserving its discretion to initiate charges for distinct criminal acts is not implicated. Having once been satisfied by the initial charge, the interests in the unfettered exercise of prosecutorial discretion is diminished and the courts will only require a showing by the accused of a reasonable fear of retaliation. In effect, therefore, the Fifth Circuit

recognizes, as does the Fourth Circuit, that the per se rule established in Blackledge is valid and to be applied in those situations involving the substitution of charges. See e.g. Jackson v. Walker, 585 F.2d 139, 143 (5th Cir. 1978) (recognizing that Blackledge sets up a per se rule for some situations, but is not unlimited).

In this case, it is clear that the felony charges levied against the defendant were based on the identical conduct which supported the original misdemeanor assault charge, which is to say that the felony charges were substituted for the lesser offenses. It is apparent, therefore, that the application of the rationale advanced by the Fifth Circuit, and other circuit courts, would only confirm the majority opinion's finding of a due process violation under the circumstances presented here. See, e.g., Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979), cert. denied, 100 S.Ct. 3038 (1980); Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979).

Similarly, a comparison of the majority opinion to the Second Circuit's holding in United States v. Ricard, 563 F.2d 45 (2d Cir. 1977), does not reveal any marked conflict. Ricard approved the addition of more serious charges by a successor prosecutor who reviewed the case file and determined to bring further charges. However, this case is distinguishable on a more fundamental basis, that is, the actual decision to proceed on more serious charges was apparently made prior to the defendant's announcement that he was going to trial, thus precluding a finding that the enhancement of charges was motivated by that exercise of procedural right. Id. at 48. 5/

5/ With respect to this issue of whether varying approaches by successive prosecutors is sufficient to rebut charges of vindictiveness, neither United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) nor United States v. Sturgill, 563 F.2d 307 (6th Cir. 1977) provides support for Petitioner's notion that the Fourth Circuit opinion reflects a conflict among the circuits. (See Pet. 17-18, 21). Andrews, at best, recognizes that the inexperience of an attorney deserves consideration, but further states that the mere fact that a prosecutor made a mistake is not, by itself, sufficient to rebut an appearance of vindictiveness. In Sturgill, the court found that the Blackledge rule was inapplicable since the accused was not required to stand trial on more severe charges than originally brought against him. The "rule" as cited by

Petitioner also refers to Ninth Circuit cases for the unremarkable proposition that a decision to bring more serious charges may be justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness. (Pet. 21). As the majority opinion in this case states in considering the positions held by other appellate courts, "[t]o the extent that these cases permit the government to rebut defendant's prima facie showing through objective proof that the increased charges could not have been brought in the first instance, they do not depart from our holding here." (Pet. App. A, 9a). Moreover, it is important to elaborate on Petitioner's brief reference to United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976). (Pet. 22, n.13). In Ruesga-Martinez, the defendant was originally charged with unlawful entry, in violation of 8 U.S.C., §1325, a misdemeanor. Subsequent to his refusal to consent to be tried by a magistrate, he was charged in a two-count indictment with felony violations of 8 U.S.C., §§1325, 1326. The court found that when the defendant exercised his right to be tried by a judge or jury, "the ensuing increase in the severity of the charges against him created a sufficient appearance of vindictiveness to bring the principles of Pearce and Blackledge into application." Id. at 1369. Expressly disclaiming reliance upon the actual motives of the prosecutor, the court reversed the defendant's conviction and remanded for dismissal of the indictment, stating:

> Therefore, in the present case appellant was entitled to exercise his right to be tried by a District Judge without fear that the prosecutor might retaliate by substituting a more serious charge for the misdemeanor charge in the original complaint.

Id. at 1370 (footnote deleted).

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the Petitioner is mere dicta and is, indeed, based on a premise which the court acknowledges has no support in the record.

Therefore, it is manifest that even assuming arguendo that the Fourth Circuit's analytical approach theoretically differs from standards employed by other circuits, the result in this case, under the narrow circumstances presented, would be the same even if determined by those standards. While there may very well be a case which will test the validity of the rationale adopted by the Fourth Circuit in United States v. Johnson, supra, and subsequently followed in the instant matter one that does more than theoretically draw into conflict varying interpretations of the vindictive prosecution doctrine Goodwin is not that case. In light of the peculiar circumstances presented here, the Petitioner's vision of a great tension between the Fourth Circuit and other appellate courts is unfounded.

5. Petitioner further claims that the majority opinion "will prevent prosecuting attorneys from fulfilling their public responsibility to prefer appropriate charges against criminal defendants after a procedural right has been exercised by the defense." (Pet. 14). Building upon its imagined inability to present evidence tending to rebut an appearance of vindictiveness, Petitioner perceives a destructive impact on prosecutorial decision-making in the wake of the majority opinion. Its misgivings are without support. It is precisely because of the Fourth Circuit's concern that the prosecution retain the full ambit of its discretion that its opinion explicitly allows the opportunity to dispel an appearance of vindictiveness. The prosecution is not unreasonably bound to its initial decision where changed circumstances support and legitimatize further prosecution. Increased charges are justifiable under several circumstances, such as the receipt of additional information through ongoing investigation, see, e.g. United States v. Griffin, 617 F.2d 1342, 1348 (9th Cir. 1980); United States v. Jamison, 505

F.2d 407, 417 (D.C. Cir. 1974), or previous legal impossibility, Blackledge v. Perry, supra, 417 U.S. at 29, n.7, and the Government is in no way precluded from presenting such explanation.

Given the fair opportunity for rebuttal which is provided, the Petitioner's fear of a strangulation of prosecutorial discretion as a result of the majority opinion is revealed to be pure fancy. It is only because of the narrow circumstances presented in this case - facts demonstrating no reason why the increased charges could not have been brought originally - that "the conclusion is inescapable that, 'but for' his election of a jury trial, the defendant would have been tried before the magistrate solely on the lesser charges." (Pet.App. A, 10a). Thus, this case presents a unique situation in which the appellate court found a due process violation within the peculiar factual context presented, and whose practical ramifications are as limited as its holding.

6. Contrary to Petitioner's suggestion, the majority decision will not result in final prosecutorial decisions being made by law enforcement officers. While it is true that proceedings in magistrate's courts are instituted upon charges which are submitted by law enforcement officers, it is equally true that representatives of the Department of Justice, whether Assistant United States Attorneys, members of the Judge Advocate General's Office, or as here, a trial attorney from the Department of Justice on "special detail", are available and presumably responsible for fulfilling the prosecutorial function. While the Petitioner refers to dire consequences due to an inability to review the evidence and the charges filed by law enforcement officers, clearly such an opportunity for review exists. The role of the representatives from the Department of Justice can only be assumed to include a proper review of the evidence, a review of the

charges initially set by law enforcement officers, and the conduct of court proceedings on behalf of the Government. If prosecutorial decisions are, in reality, reached and finalized by law enforcement officers, it will only be the result of an abdication of the prosecutorial function by those assigned to carry it out, and not the result of the Fourth Circuit's decision in this matter.

7. In the final analysis, it is clear that the majority decision correctly applies well-established principles of due process to a unique and narrow set of circumstances. It is also evident that the result reached here pursuant to the Fourth Circuit's interpretation of this Court's decision in Blackledge v. Perry would remain unchanged even under those interpretations of the vindictive prosecution doctrine advanced by other circuits. Furthermore, it has been demonstrated that the Petitioner's claimed encroachment upon the exercise of prosecutorial discretion is totally unfounded and, indeed, is based upon a fundamental misunderstanding of the majority opinion.

Petitioner has suggested that this case presents issues of exceptional importance. Respondent respectfully disagrees. Given the facts of this case and the relevant legal principles, it is apparent that this case affords no crucible for the testing of differing approaches to the issue of prosecutorial vindictiveness. Furthermore, it neither unduly nor inappropriately upsets or interferes with the established workings of the criminal justice system, nor does it otherwise represent a case of wide-ranging importance.[6/] Quite simply, the majority

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[6/] Respondent recognizes that claims of prosecutorial vindictiveness are the subject of frequent litigation in the lower courts. Indeed, Petitioner has cataloged recent examples of such claims. (Pet. 12-13, n.6). However, that decisions such as North Carolina v. Pearce, Blackledge v. Perry, and Bordenkircher v. Hayes, generate such litigation is not adequate justification for a further review by this Court where, as here, any genuine conflict among the circuits or general confusion on the issues that exist in the wake of said decisions is not implicated in the lower court's holding.

Further, a review of the cases collected by Petitioner, the majority of which reject claims of prosecutorial vindictiveness, fail to disclose either an unduly expansive or inconsistent interpretation of the vindictive prosecution doctrine.

opinion offers a resolution based on well-settled law to a narrow and peculiar problem, a resolution whose importance to the Respondent is undoubtedly immeasurable but whose implications beyond the confines of the case itself are minimal.

CONCLUSION

For the aforegoing reasons, the Respondent respectfully suggests that the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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IN THE

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vs.

LEARLEY REED GOODWIN, RESPONDENT.

_____

_____

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, Learley Reed Goodwin, pursuant to Rule 46 of the Rules of the Supreme Court of the United States, and 18 U.S.C., §3006A(d)(6), asks leave to file the attached Respondent's Brief in Opposition on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, without prepayment of fees and costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the United States District Court for the District of Maryland and on appeal to the United States Court of Appeals for the Fourth Circuit, and has not previously sought leave to proceed in forma pauperis in any court below.

Respectfully submitted,

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